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No. 91-1483

Supreme Court, U.S.
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In the Supreme Court of the United States

OCTOBER TERM, 1991

STATE OF IDAHO, PETITIONER

v.

DEPARTMENT OF ENERGY, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE FEDERAL RESPONDENT IN OPPOSITION

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QUESTION PRESENTED

Whether Part B of the Nuclear Waste Policy Act of 1982 (NWPA), 42 U.S.C. 10151-10157, which authorized the Secretary of Energy to enter into contracts with utilities from 1983 to 1990 for the interim storage of spent nuclear fuel, applies to a research and development contract that was entered into 17 years before enactment of the NWPA.

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OPINION BELOW

The opinion of the court of appeals (Pet. App. 1-11) is reported at 945 F.2d 295.

JURISDICTION

The judgment of the court of appeals was entered on September 20, 1991. A petition for rehearing was denied on December 13, 1991. The petition for a writ of certiorari was filed on March 12, 1992. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. In 1983, Congress enacted the Nuclear Waste Policy Act of 1982 (NWPA), Pub. L. No. 97-425, 96 Stat. 2201, codified at 42 U.S.C. 10101 *et seq.*, primarily to establish a process for locating, evaluating, and choosing an appropriate site for the permanent disposal of high-level radioactive waste and spent nuclear fuel. The procedures for selecting such a repository, which are contained in Part A of the Act, 42 U.S.C. 10131-10145, are not at issue in this case.

This case concerns Part B of the NWPA, 42 U.S.C. 10151-10157, wherein Congress created a "limited program for Federal storage of spent fuel from civilian nuclear powerplants." S. Rep. No. 282, 97th Cong., 1st Sess. 35 (1981). The impetus for this program was the fact that many utilities were reaching the limit of their storage capacity for spent fuel at the reactor sites. H.R. Rep. No. 785, 97th Cong., 2d Sess. Pt. 1, at 40 (1982). Congress accordingly authorized the federal government to provide a limited amount of capacity for "interim storage of spent nuclear fuel for civilian nuclear power reactors that cannot reasonably provide adequate storage capacity at the sites of such reactors." 42 U.S.C. 10151(a)(3).

Consistent with this purpose, Section 10155(a)(1) of Part B required the Department of Energy (DOE) to "provide * * * not more than 1,900 metric tons of capacity for the storage of spent nuclear fuel from civilian nuclear power reactors." This storage could be provided at an existing federal storage facility, at the site of a civilian nuclear plant, or in mobile storage equipment. 42 U.S.C. 10155(a)(1)(A)-(C). Storage under Part B could be provided only if DOE entered into a contract with the utility, and if the Nuclear Regulatory Commission had made certain

determinations regarding the unavailability of storage at the reactor site. 42 U.S.C. 10155(b)(1). DOE was authorized to enter into Part B contracts for the storage of spent fuel only "[d]uring the period following January 7, 1983, but not later than January 1, 1990." 42 U.S.C. 10156(a)(1).

Special environmental review requirements were established for the provision of storage capacity under Part B. Specifically, preparation of an environmental impact statement (EIS) under the National Environmental Policy Act (NEPA) would not generally be required where storage was being made available at a facility that "is already being used, or has previously been used, for such storage." 42 U.S.C. 10155(a)(1)(A)(ii). An EIS would be required only where DOE decided to provide storage under Part B for 300 or more metric tons of spent fuel at any one facility. 42 U.S.C. 10155(c)(1). Otherwise, DOE would simply prepare an environmental assessment covering several specified subjects. 42 U.S.C. 10155 (c)(2)(A). Issuance of "any environmental impact statement or environmental assessment prepared pursuant to this subsection" was to be reviewable directly in the appropriate court of appeals. 42 U.S.C. 10155(c)(3); see 42 U.S.C. 10139(a)(1)(D) and (E).

2. This case involves a contract entered into in 1965 between the Atomic Energy Commission, a predecessor of DOE, and Public Service Co. of Colorado (PSC) for construction of an experimental nuclear power generator. This contract, which predated the enactment of the NWPA by some 17 years, was entered into pursuant to the Act of June 2, 1965, Pub. L. No. 89-32, § 107, 79 Stat. 122-123. That statute authorized the Commission to enter into a "cooperative arrangement" with a utility for "participation in the research and development, design, construction, and operation

of a high-temperature gas-cooled nuclear powerplant," and to purchase Uranium-233 "produced in and discharged from the reactor." 79 Stat. 122-123. The 1965 contract accordingly obligated the Commission to purchase Uranium-233 discharged from the experimental reactor (generally known as spent fuel). Pet. App. 2.

In 1975, the Commission, in anticipation of its responsibility for purchasing the spent fuel, constructed a storage facility for the fuel at the Idaho National Engineering Laboratory (INEL). Pet. App. 3. The experimental reactor was constructed by PSC in Fort St. Vrain, Colorado, and began commercial operation in 1979. *Id.* at 2-3. In 1980, the contract between the government and PSC was modified to specify that the government was obligated to receive eight fuel segments from the reactor, and could at its option receive the ninth and last fuel segment. *Id.* at 3, 4. From 1980 to 1986, three fuel segments were transported to INEL without incident. *Id.* at 3.

At the time of the 1980 contract modification, the parties had envisioned that deliveries of all eight fuel segments would be completed by January 1987. Both DOE and PSC understood the 1980 modification to obligate DOE to accept the eight fuel segments regardless of when the segments were shipped, however, and they formally confirmed that understanding in May 1988. Pet. App. 3-4.

In August 1989, PSC decided to shut down the reactor, and informed DOE that it planned to deliver the remaining fuel segments to INEL. Pet. App. 4. DOE prepared an environmental assessment pursuant to the National Environmental Policy Act (NEPA), and concluded that the transport and storage of the remainder of the spent fuel would have no significant environmental impact. *Ibid.* Petitioner

thereupon filed a petition for review in the court below, claiming that the proposed transfer of the remainder of the spent fuel to INEL violated NEPA and Part B of the NWPA. Petitioner asserted that the court of appeals had original jurisdiction over its claims pursuant to the judicial review provision of the NWPA, 42 U.S.C. 10139.

3. The court of appeals ruled that Part B of the NWPA did not apply to storage of spent fuel under the 1965 contract between the government and PSC. The court pointed out that the various requirements of Part B were expressly limited to storage of spent fuel pursuant to the specific and limited program created by Part B itself. Pet. App. 8-9. The court noted that Congress was aware when it enacted the NWPA that the government had preexisting obligations for the storage of spent fuel. Nevertheless, "[t]he Act's restrictive language limits the requirements to the specific set of remedial storage agreements authorized by the Act itself." *Id.* at 9. The court concluded, therefore, that the limitations in Part B did not affect the storage of spent fuel in this case, because the NWPA "does not apply to federal interim storage agreements in existence before its enactment." *Ibid.*

The court of appeals also rejected petitioner's argument that the DOE had no authority to provide for interim storage independent of the NWPA, finding that the original statutory authorization for the Fort St. Vrain project had vested the government with the requisite authority. Pet. App. 9-10. In addition, the court found that the May 1988 confirmation of DOE's and PSC's understanding of the contract was not subject to the requirements of the NWPA, because it "merely clarified the parties' pre-existing obligations and did not constitute a separate contractual agreement." *Id.* at 10. Accordingly, the court dismissed the

petition for review, since the NWPA, along with its direct review provisions, did not apply. *Id.* at 2, 11.[1]

ARGUMENT

The decision of the court of appeals is correct and does not conflict with any decision of this Court or any other court of appeals. Moreover, the issue is not likely to arise again. Accordingly, further review is not warranted.

1. The statutory text of Part B makes it clear that Congress did not intend to affect existing arrangements for the storage of spent fuel. Section 10155 (a)(5) required DOE to ensure that storage capacity would be "made available * * * when needed, as determined on the basis of the storage needs specified in contracts entered into under section 10156(a)." 42 U.S.C. 10155(a)(5). This language demonstrates that Congress was legislating with respect to future storage that would be "made available" when certain contracts were "entered into," not storage already

[1] Because of its resolution of the jurisdictional issue, the court of appeals did not address respondent's other defenses. In particular, respondent asserted below, and maintains in this Court, that (1) the petition for review in the court of appeals was time-barred by the 180-day limitations period set forth in 42 U.S.C. 10139(c), since petitioner did not challenge the decision to store spent fuel from the Fort St. Vrain reactor at INEL until long after the 180-day period had expired; (2) under *Bowen* v. *Georgetown University Hosp.*, 488 U.S. 204, 208 (1988), and *United States* v. *Security Indus. Bank*, 459 U.S. 70, 79 (1982), the NWPA cannot be applied retroactively to affect preexisting contractual rights arising out of the 1965 contract between the government and PSC; and (3) the NWPA's legislative history indicates that it was intended to apply only to storage of spent fuel from non-experimental commercial light-water reactors, and has no application to the unique storage problems posed by spent fuel from the Fort St. Vrain high-temperature gas-cooled experimental reactor.

taking place pursuant to existing contracts. Similarly, Section 10155(b)(1) provided that DOE "shall offer to enter into, and may enter into, contracts under section 10156(a)" under certain specified conditions. 42 U.S.C. 10155(b)(1). Contracts under Section 10156(a) could be entered into only "[d]uring the period following January 7, 1983, but not later than January 1, 1990," and had to contain certain provisions, such as that the United States "will" take title to the spent fuel, while the utility "shall" provide payment for the storage in accordance with a fee schedule to be set by the Secretary. 42 U.S.C. 10156(a). This wholly prospective language clearly rebuts petitioner's claim that Congress intended to affect pre-NWPA storage contracts.[2]

Petitioner errs in relying (Pet. 13-16), by analogy, on cases decided under NEPA. Section 102(2)(C) of NEPA applies generally to "every recommendation or report on proposals for * * * major Federal actions significantly affecting the quality of the human environment." 42 U.S.C. 4332(2)(C). This broad language contrasts starkly with the language of the NWPA, which expressly limits the requirements of Part B to

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[2] Petitioner's contention (Pet. 20 n.10) that the contract with PSC "expired" in 1987, and had to be renewed under the provisions of the NWPA in May 1988, was properly rejected by the court of appeals. As that court found (Pet. App. 10), the intent and understanding of the 1980 contract modification was to obligate the government to accept delivery of eight spent fuel segments regardless of timing. Thus, the May 1988 confirmation of the parties' understanding did not constitute a new agreement subject to the NWPA, but merely recognized the fact that the 1965 contract, as modified in 1980, continued in effect. *Ibid.* Petitioner points to no evidence suggesting that the court of appeals' finding on this point was in error, and in any event this fact-bound question of contractual interpretation is not worthy of this Court's review.

storage provided under its provisions. See, *e.g.*, 42 U.S.C. 10155(c) and (d). No statutory language or case authority supports petitioner's attempt to remake Part B into a statute that comprehensively governs all federal storage of spent nuclear fuel.

2. Petitioner also errs in contending (Pet. 8) that the issue presented is of recurring importance. The restrictions contained in Part B of the NWPA applied only to contracts entered into under the authority of that statute. We are informed by DOE that no contracts were entered into under Part B during the seven years in which such contracts were authorized, and the authority for such contracts expired in 1990. 42 U.S.C. 10156(a). To our knowledge, no cases have arisen under Part B, and in light of the expiration of DOE's contracting authority it would appear unlikely that any such cases will arise in the future. Moreover, petitions for judicial review under the NWPA must generally be brought within 180 days of the challenged action or failure to act, 42 U.S.C. 10139(c), and thus the likelihood of future cases involving challenges under Part B to storage contracts entered into before the 1983 enactment of the NWPA is exceedingly slight.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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